

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Criminal No. 2006-80
GELEAN MARK,	)	
VERNON FAGAN,	)	
WALTER ELLS,	)	
DORIAN SWAN,	)	
KELVIN MOSES,	)	
HENRY FREEMAN, and	)	
EVERETTE MILLS,	)	
	)	
Defendants.	)	
_____	)	

**ATTORNEYS:**

**Delia L. Smith, AUSA**  
St. Thomas, U.S.V.I.  
*For the Plaintiff,*

**Derek Hodge, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Gelean Mark,*

**Kevin D'Amour, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Vernon Fagan,*

**Carl R. Williams, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Walter Ells,*

**Thurston T. McKelvin, FPD**  
St. Thomas, U.S.V.I.  
*For the defendant Dorian Swan,*

**Andrew L. Capdeville, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Kelvin Moses,*

**Dale L. Smith, Esq.**  
New York, NY  
*For the defendant Henry Freeman,*

**Arturo R. Watlington, Jr., Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Everette Mills.*

**MEMORANDUM OPINION**

Before the Court is defendant Dorian Swan's ("Swan") motion for revocation or amendment of the Magistrate Judge's pretrial detention orders, entered on February 20, 2007, and July 23, 2007. For the reasons stated below, the Court will deny Swan's motion.

**I. FACTS**

On December 19, 2006, Swan was indicted for conspiracy to distribute a controlled substance. The government moved for pretrial detention of Swan, pursuant to title 18, section 3142 of the United States Code ("Section 3142").

**A. The February 8, 2007, Detention Hearing**

The Magistrate Judge conducted a hearing on the government's pretrial detention motion on February 8, 2007. Swan was present and represented by counsel at the detention hearing. Officer Mark Joseph, an officer with the Virgin Islands police department

working as a Task Force Agent with the Drug Enforcement Administration ("DEA"), testified on behalf of the government. Agent Joseph testified that he had learned from an informant that Swan had paid the informant \$1,000 to transport \$198,000 cash to the Virgin Islands. The informant also indicated that Swan had contracted him on three separate occasions to transport \$675,000, \$40,000, and \$50,000 to the Virgin Islands.

Agent Joseph further testified that information obtained pursuant to an FBI investigation revealed that Swan was in the business of hiring individuals for assassination purposes. That information was received by a confidential informant and corroborated by police training and experience. Agent Joseph also testified that the FBI report showed that Swan had a prior criminal history, including an uncorroborated gun conviction.

Mark Thomas, a High Intensity Drug Trafficking Area ("HIDTA") Officer also testified on behalf of the government at the February 8, 2007, hearing. Officer Thomas stated that he had learned from a confidential informant that Swan had contracted an individual to kill another individual who had purportedly killed one of Swans friends in the past. The informant had indicated that he feared for his life and will not return to the territory.

The government also presented several reports detailing the investigations described above.

Swan's mother, Rose Maria Christian ("Christian") testified on his behalf at the detention hearing and offered to serve as his third party custodian upon release. She indicated that Swan has lived in Atlanta, Georgia for approximately six or seven years. Swan has not lived in the U.S. Virgin Islands for at least thirteen years. According to Christian, Swan is unemployed, but occasionally purchases items for the family Army Navy store. Swan also owns an interest in the family business, and has one daughter. Christian owns a home with her husband. She stated that she would be willing to post her home as security for Swan's release. While Christian's husband was not present at the hearing to post his interest in the property, it was proffered that he would be willing to do so. Christian indicated that swan would be allowed to live with her and her husband if released pending trial, and requested that he be allowed to work in the family store during work hours.

On February 20, 2007, the Magistrate Judge granted the government's motion and ordered that Swan be detained pending further disposition of this matter.

**B. The July 18, 2007, Detention Hearing**

Swan moved for reconsideration of the detention order, and the Magistrate Judge conducted a second detention hearing on July 18, 2007. Again, Swan was present and represented by counsel. Swan presented no new evidence at the second detention hearing. Instead, Swan argued that in light of additional discovery received from the government containing no additional information against him, his continued pretrial detention violated his due process rights as well as his Sixth Amendment right to counsel. Additionally, Swan argued that there exist conditions that could reasonably assure his appearance in court and the safety of the community.

The government presented new testimony from Agent Joseph at the July 18, 2007, hearing. Agent Joseph stated that a cooperating witness told the police that a third party acting on behalf of Swan had contacted him and offered him money not to testify against Swan at the trial in this matter. Agent Joseph stated that the DEA had deliberately failed to prepare the report detailing this information out of concern for the witness' safety.

On July 23, 2007, the Magistrate Judge again ordered that Swan be detained pending trial.

On August 3, 2007, Swan moved for revocation or amendment of the Magistrate Judge's detention orders.

## **II. DISCUSSION**

Title 18, section 3145(b) of the United States Code ("Section 3145(b)") provides that a person who has been ordered to be detained pending trial by a magistrate judge may move for revocation or amendment of the detention order in the court with original jurisdiction over the matter. 18 U.S.C. § 3145(b) (1990). "When the district court acts on a motion to revoke or amend a magistrate's pretrial detention order, the district court acts *de novo* and must make an independent determination of the proper pretrial detention or conditions for release." *United States v. Rueben*, 974 F.2d 580, 585-86 (5th Cir. 1992); *cf.* *United States v. Delker*, 757 F.2d 1390, 1394 (3d Cir.1985) (holding that the Bail Reform Act, 18 U.S.C. § 3145(b), *et seq.*, contemplates *de novo* review by the district court of a magistrate's order for bail pending trial). Under this standard, "a district court should not simply defer to the judgment of the magistrate. . . ." *United States v. Leon*, 766 F.2d 77, 80 (2nd

Cir. 1985) (noting that a reviewing court "should fully reconsider a magistrate's denial of bail").

In conducting a *de novo* review of a magistrate judge's pretrial detention order, the court may rely on the evidence presented before the magistrate judge. *See United States v. Koenig*, 912 F.2d 1190, 1193 (9th Cir. 1990) ("[T]he district court is not required to start over in every case . . . ."); *United States v. Chagra*, 850 F. Supp. 354, 357 (W.D. Pa. 1994) (noting that the court may incorporate the records of the proceedings and the exhibits before the magistrate judge). Though not required to do so, the reviewing court may, in its discretion, choose to hold an evidentiary hearing if necessary or desirable to aid in the determination. *See Koenig*, 912 F.2d at 1193; *see also United States v. Lutz*, 207 F. Supp. 2d 1247 (D. Kan. 2002) ("*De novo* review does not require a *de novo* evidentiary hearing.>").

### **III. ANALYSIS**

Swan argues that the evidence presented at the detention hearings on January 3, 2007, and July 18, 2007, supports the conclusion that he should be released pending trial.

Pretrial detention of a criminal defendant will be ordered only if, after a hearing upon motion by the government, a

"judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."  
18 U.S.C. § 3142(e) (2006). Furthermore, a finding by the judicial officer that there is probable cause to believe the defendant committed "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. § 801 *et seq.*)" raises the rebuttable presumption that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." *Id.*

The fact that a defendant has been indicted for a crime carrying a maximum prison term of ten years or more under the Controlled Substances Act is sufficient to support a finding of probable cause, triggering the rebuttable presumption in favor of pretrial detention. *See United States v. Suppa*, 799 F.2d 115, 119 (3d Cir. 1986) ("[B]ecause an indictment . . . conclusively demonstrates that probable cause exists to implicate a defendant in a crime, [t]he indictment, coupled with the government's request for detention, is a sufficient basis for requiring an *inquiry* into whether detention may be necessary." (internal citations and quotations omitted)).

The showing of probable cause (by means of an indictment) may be enough to justify detention if the defendant fails to meet his burden of production, or if the government's showing is sufficient to countervail the defendant's proffer, . . . but it will not necessarily be enough, depending upon whether it is sufficient to carry the government's burden of persuasion.

*Id.* (quoting *United States v. Hurtado*, 779 F.2d 1467, 1478 (11th Cir. 1985)) (emphasis in original). To rebut the statutory presumption in favor of detention, a defendant must produce "some credible evidence" to assure his presence before the court and the safety of the community. *United States v. Carbone*, 793 F.2d 559, 560 (3d Cir. 1986).

The determination of whether any conditions of release can reasonably assure the defendant's appearance in court and the safety of others is based on the following four factors:

(1) the nature and seriousness of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person and the community that would be posed by the person's release.

*United States v. Traitz*, 807 F.2d 322, 324 (3d Cir. 1986) (citing 18 U.S.C. § 3142(g) ("Section 3142(g)")); see also *United States v. Coleman*, 777 F.2d 888, 892 (3d Cir. 1985).<sup>1</sup>

The only evidence Swan presented to rebut the statutory presumption against his pretrial release was the testimony of his mother, who was willing to serve as third party custodian for him if released pending trial. However, the government presented evidence showing that Swan had access to large amounts of cash, engaged in the practice of hiring hit men to assassinate other individuals, instilled fear in at least one confidential informant, and threatened a potential witness. Additionally, the government's evidence demonstrated that Swan had a criminal history involving weapons.

---

<sup>1</sup> The sub-factors relevant to the consideration of a defendant's characteristics and history include:

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law . . . .

After reviewing the evidence, the Court finds that Swan has failed to rebut the statutory presumption that no condition or combination of conditions would reasonably assure his presence in court and the safety of the community. *See, e.g., United States v. Suppa*, 799 F.2d 115, 119-120 (holding that the defendant, charged with conspiracy to distribute cocaine, failed to rebut the statutory presumption against pretrial release where he presented no testimony by co-workers, neighbors, family physicians, friends or other associates showing that he would not pose a danger to the community upon release); *Perry*, 788 F.2d at 106-07 (holding that the defendant's testimony about his ties to the community and the fact that he had obeyed the conditions of his release on state charges, was inadequate evidence to rebut the presumption of dangerousness triggered by his indictment on drug conspiracy charges).

#### **IV. CONCLUSION**

For the foregoing reasons, the Court will deny Swan's motion for revocation or amendment of the Magistrate Judge's order for pretrial detention. An appropriate order follows.

**Dated: August 25, 2007**

**S\\_\_\_\_\_**

*United States v. Mark, et al.*  
Criminal No. 2006-80  
Judgment  
Page 12

**CURTIS V. GÓMEZ**  
**Chief Judge**

Copy: Hon. Geoffrey W. Barnard  
Delia L. Smith, AUSA  
Kevin D'Amour, Esq.  
Derek Hodge, Esq.  
Carl R. Williams, Esq.  
Thurston T. McKelvin, FPD  
Jesse Gessin, AAFP  
Andrew L. Capdeville, Esq.  
Dale L. Smith, Esq.  
Arturo R. Watlington, Jr., Esq.  
Mrs. Trotman  
Ms. Donovan  
Mrs. Schneider  
Probation  
U.S. Marshals  
Bailey Figler, Esq.